

Revised Voluntary Fiduciary Correction Program



U.S. Department of Labor
Employee Benefits Security Administration
April 2005

On April 6, 2005, the Department of Labor published in the *Federal Register* a revised Voluntary Fiduciary Correction Program (VFCP), which simplified and expanded the original VFCP. The VFCP is designed to encourage employers to voluntarily comply with the Employee Retirement Income Security Act (ERISA) by self-correcting certain violations of the law. Many workers can benefit from the VFCP as a result of the increased retirement security associated with restoration of plan assets and payment of additional benefits. It also will help plan officials understand the law. The revised VFCP describes how to apply, the 18 specific transactions covered, acceptable methods for correcting violations, and examples of potential violations and corrective actions. The Department issued the revised VFCP as a proposal subject to notice and comment, but the revised VFCP was effective immediately to permit applicants to rely on the revised provisions in seeking relief. Alternatively, applicants may choose to rely on the provisions of the original VFCP until the revised VFCP is published in final form. Both the original and the proposed versions of the VFCP also will be available on the Department's website at www.dol.gov/ebsa until the revised VFCP is finalized.

The Department also provides applicants conditional relief from payment of excise taxes for certain VFCP transactions under a class exemption related to the original VFCP, which is discussed in detail in the Fact Sheet for the original VFCP. Amendments to this class exemption, which correspond to one of the new transactions included in the revised VFCP, have also been proposed and are discussed, along with their effective date, briefly below.

Who is Eligible

Anyone who may be liable for fiduciary violations under ERISA, including employee benefit plan sponsors, officials, and parties in interest, may voluntarily apply for relief from enforcement actions, provided they comply with the criteria and satisfy the procedures outlined in the VFCP.

VFCP Criteria

Persons using the VFCP must fully and accurately correct violations. Incomplete or unacceptable applications may be rejected. If rejected, applicants may be subject to enforcement action, including assessment of civil monetary penalties under Section 502(l) of ERISA.

How to Apply

Applicants do not need to consult or negotiate with EBSA to use the VFCP. They merely need to follow the procedures outlined in the notice published in the April 6, 2005, *Federal Register*. See <http://www.dol.gov/ebsa/regs/fedreg/notices/2005-vfcp.htm> for more information. Violations can be fully and correctly resolved in four easy steps:

- Identify any violations and determine whether they fall within the transactions covered by the VFCP;
- Follow the process for correcting specific violations (i.e., improper loans or incorrect valuation of plan assets);
- Calculate and restore any losses or profits with interest, if applicable, and distribute any supplemental benefits to participants; and
- File an application with the appropriate EBSA regional office that includes documentation showing evidence of corrective action taken.

Covered Transactions

The VFCP provides descriptions of 18 transactions and their methods of correction. Corrective remedies are prescribed for the following fiduciary violations involving employee benefit plans:

- Delinquent Participant Contributions and Participant Loan Repayments to Pension Plans
- Delinquent Participant Contributions to Insured Welfare Plans
- Delinquent Participant Contributions to Welfare Plan Trusts
- Fair Market Interest Rate Loans With Parties in Interest
- Below Market Interest Rate Loans With Parties in Interest
- Below Market Interest Rate Loans With Non Parties in Interest
- Below Market Interest Rate Loans Due to Delay in Perfecting Security Interest
- Participant Loan Amount Exceeds Plan Limitations
- Participant Loan Duration Exceeds Plan Limitations
- Purchase of Assets by Plans from Parties in Interest
- Sale of Assets by Plans to Parties in Interest
- Sale and Leaseback of Property to Sponsoring Employers
- Purchase of Assets from Non Parties in Interest at Other Than Fair Market Value
- Sale of Assets to Non Parties in Interest at Other Than Fair Market Value
- Holding of an Illiquid Asset Previously Purchased by Plan
- Benefit Payments Based on Improper Valuation of Plan Assets
- Payment of Duplicate, Excessive, or Unnecessary Compensation
- Payment of Dual Compensation to Plan Fiduciaries

Acceptable Corrections

The VFCP provides rules for making acceptable corrections involving the transactions listed above. Applicants generally must:

- Conduct valuations of plan assets using generally recognized markets for the assets or obtain written appraisal reports from qualified professionals that are based on generally accepted appraisal standards;
- Restore to the plan the principal amount involved, plus the greater of lost earnings, starting on the date of the loss and extending to the recovery date, or profits resulting from the use of the principal amount, starting on the date of the loss and extending to the date the profit is realized;
- Pay the expenses associated with correcting transactions, such as appraisal costs or fees associated with recalculating participant account balances; and
- Make supplemental distributions to former employees, beneficiaries, or alternate payees when appropriate, and provide proof of the payments.

VFCP Documentation

Under the VFCP, applicants must provide supporting documentation to the appropriate regional office of EBSA. Required documentation includes:

- Copy of relevant portions of plan and related documents;
- Documents supporting transactions, such as leases and loan documents, and applicable corrections;
- Documentation of lost earnings amounts;
- Documentation of restored profits, if applicable;
- Proof of payment of required amounts;
- Specific documents required for relevant transactions, as outlined in Section 7 of the VFCP;
- Signed checklist; and
- Penalty of perjury statement.

The revised VFCP also provides a model application form. While use of this model application form is entirely voluntary, EBSA encourages its use to avoid common application errors that frequently result in processing delays or rejections.

Restitution to Plans

Applicants must restore the plan, participants, and beneficiaries to the condition they would have been in had the breach not occurred. The revised VFCP includes an online calculator on EBSA's website to assist applicants by automatically calculating correction amounts that must be paid to the plan. Plans must then file, where necessary, amended returns to reflect corrected transactions or valuations.

Applicants also must provide proof of payment to participants and beneficiaries, or properly segregate the affected assets in cases where the plan is unable to identify the location of missing individuals. Payment of the correction amount may be made directly to the plan where distributions to separated participants would be less than \$20 and the cost of correction exceeds the distributions owed.

Excise Tax Exemption

The Department proposed amendments to class exemption PTE 2002-51 to provide excise tax relief for prohibited transaction violations involved in “the holding of an illiquid asset previously purchased by a plan,” one of the new transactions contained in the revised VFCP. These amendments were published in the April 6, 2005 *Federal Register* simultaneously with the revised VFCP. While PTE 2002-51 as originally granted will continue to be effective for the four transactions identified therein, it is important to note that the excise tax relief for prohibited transactions incurred with respect to “the holding of an illiquid asset previously purchased by a plan” will not be available until the amendment of PTE 2002-51 has been finalized.

A copy of PTE 2002-51, as well as a listing of Frequently Asked Questions on the exemption, is available at www.dol.gov/ebsa/compliance_assistance.html#section8, and the proposed amendments to PTE 2002-51 may be viewed at <http://www.dol.gov/ebsa/regs/fedreg/notices/2005-vfcp2.htm>.

Contacts for Additional Information

For additional information, VFCP applicants may contact the appropriate regional office at EBSA’s toll-free Employee and Employer Hotline number: **1-866-444-EBSA (3272)** and request the VFCP coordinator.

* This fact sheet has been developed by the U.S. Department of Labor, Employee Benefits Security Administration, Washington, DC 20210. It will be made available in alternate formats upon request: Voice phone: (202) 693-8664; TTY: 1-202-501-3911. In addition, the information in this fact sheet constitutes a small entity compliance guide for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996.